IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

COLGAN AIR, INC.,

Appellant,

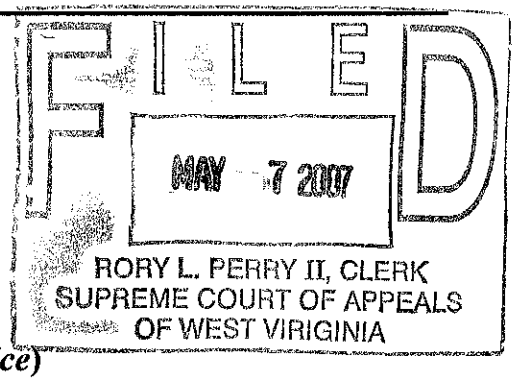
v.

APPEAL NO. :070285
(West Virginia Human Rights Commission Docket No. ERRELNOANCSREP-391-02)

WEST VIRGINIA HUMAN RIGHTS COMMISSION, RAO ZAHID KHAN,

Appellees.

COLGAN AIR, INC.'S APPELLATE BRIEF



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May 7, 2007

TABLE OF CONTENTS

TABLE OF AUTHORITIES

WEST VIRGINIA SUPREME COURT OF APPEALS **PAGE**

U.S. DISTRICT COURT, NORTHERN DISTRICT OF WEST VIRGINIA

UNITED STATES SUPREME COURT

4TH CIRCUIT COURT OF APPEALS

7TH CIRCUIT COURT OF APPEALS

8TH CIRCUIT COURT OF APPEALS

U.S. DISTRICT COURT, NORTHERN DISTRICT OF ILLINOIS

STATUTES AND REGULATIONS

I.
KIND OF PROCEEDING AND NATURE OF THE RULING BELOW

This is an appeal of a decision of the West Virginia Human Rights Commission ("the Commission"). Appellee Rao Zahid Khan ("Appellee" or "Mr. Khan") filed a discrimination action with the Commission in April 2002, asserting claims against his former employer, Appellant Colgan Air, Inc. ("Appellant" or "Colgan Air"), a regional airline. In March 2005, Administrative Law Judge ("ALJ") Robert Wilson presided over a two day public hearing at which time all parties were present and afforded the opportunity to present evidence.[1]

Mr. Khan alleged that, while he was employed at Colgan Air, he was subjected to a hostile work environment due to his race, religion, ancestry, and sex; that the offensive conduct was perpetrated by his supervisors; and that Colgan Air did not take prompt remedial measures to address the situation. However, the evidence introduced at the public hearing, and Judge Wilson's findings of fact, do not support these legal conclusions. Colgan Air took prompt and effective remedial action to address the offensive behavior as soon as management was notified of the situation, in accordance with its established policies and procedures regarding harassment in the workplace. The offensive individuals were called for disciplinary meetings, issued written reprimands, and, when the behavior did not stop, forced to resign. (Final Decision of Judge Robert Wilson, pp. 7-10; Tr. of Public Hr'g on March 30, 2005, hereinafter referred to as "Tr. Vol. I," pp. 86-87, 117-19; Appellee's Public Hearing Exhibit 5; Petitioner's Public Hearing Exhibit 10). Mr. Khan himself admitted that after these actions were taken, the harassment stopped. (Tr. Vol. I, pp. 286-87; Tr. of Public Hr'g on March 31, 2005, hereinafter referred to as "Tr. Vol. II," pp. 70-74). Moreover, the individuals responsible for the offensive behavior were not supervisory personnel. (Final Decision of Judge Wilson, p. 23; Tr. Vol. I, pp. 76). Because

[1] This matter was initially assigned to ALJ Elizabeth Blair. However, on February 23, 2005, for administrative purposes and per instructions from the Commission's Chief ALJ Phyliss H. Carter, the case was transferred to ALJ Robert Wilson. (Order Transferring Case, dated February 23, 2005).

Colgan Air took prompt and effective remedial action, these individuals' conduct cannot be factually imputed to the Appellant.

Next, Mr. Khan claimed that he was subjected to disparate treatment and retaliatory discharge because he was not promoted to Captain, was asked to resign after failing an FAA-mandated proficiency check, and not offered an opportunity to retrain. However, the evidence reveals Mr. Khan was not upgraded to Captain because he simply did not possess the flight skills necessary to be a pilot-in-command of a passenger flight. He consistently exhibited a lack of proficiency in his flight skills, as ultimately displayed during the failed proficiency check. (Tr. Vol. II, pp. 119-128, 131-36, 184-87; Appellant's Public Hearing Exhibits 2, 5, 6, 12). Moreover, at the time that Mr. Khan failed his proficiency check, Colgan Air was suffering from extreme financial difficulties due to the decrease in air traffic following September 11, 2001. Thus, Colgan Air had furloughed numerous qualified pilots, and ceased all simulator training for pilots who could not meet the FAA's minimum proficiency requirements. Colgan Air made a legitimate, non-discriminatory business decision to forego retraining and request Mr. Khan's resignation. (Tr. Vol. I, pp. 140-43; Tr. Vol. II, p. 140; Appellant's Public Hearing Exhibit 8).

Upon completion of the public hearing, Judge Wilson held that Mr. Khan had failed to prove by a preponderance of the evidence that illegal discrimination or retaliation was a motivating factor for Colgan Air's employment decisions, nor did he prove that Colgan's Air's actions were insufficient to deter the abusive conduct of its non-supervisory personnel. Notably, in his Final Decision, Judge Wilson stated that there was insufficient factual basis for imputing the hostile and abusive work environment to Colgan Air because it "took reasonable steps to know about any discriminatory conduct and reacted with strong and decisive measures to cease that conduct once its management personnel became aware of that conduct." The judge also stated: "The undersigned cannot agree with Complainant's assessment that nothing was ever done about his complaints." (Final Decision of Judge Wilson, p. 26). Additionally, Judge Wilson determined that Colgan Air "articulated legitimate non discriminatory reasons for its failure to upgrade Complainant to Captain and his forced resignation following an FAA

proficiency check ride. Those reasons being his poor pilot skills and his failing three required maneuvers during the FAA proficiency check ride." Thus, the complaint was dismissed by Judge Wilson. (Final Decision of Judge Wilson, pp. 34-35).

Mr. Khan subsequently appealed to the full Human Rights Commission. Upon the evidence of record and the arguments before them, the Commission rendered a decision on December 22, 2006, and significantly modified Judge Wilson's order. Specifically, the Commission held that Colgan Air was liable in damages to Complainant for $5,000.00 for the harassment he suffered, in addition to his attorneys' fees and costs in the amount of $46,575.00. The Commission's decision lacked any factual detail to support its determination, and repeatedly stated that Colgan Air's "local management" at the Tri-States Airport should have taken action and notified corporate management in Manassas, Virginia. (Final Order of West Virginia Human Rights Commission, pp. 1-2). The foundation for this assertion is unclear. The Commission apparently ignored the extensive testimony, documentary evidence, and Judge Wilson's findings of fact that no Colgan Air management personnel were located at the Tri-States Airport. There is no concept of "local management" in Colgan Air's business structure. Similar to most airlines, management personnel are based at the company's headquarters, not at the airport crew bases around the country. Moreover, Colgan Air policies and procedures clearly state that any incidents of discrimination or harassment should be reported to management personnel in Manassas, Virginia. (Final Order of Judge Wilson, pp. 5-6, 23-24; Tr. Vol. I, pp. 54-56; Appellant's Public Hearing Exhibits 1, 3).

The Commission also held that Mr. Khan was discriminated against because he was not offered retraining after he failed the FAA-mandated proficiency check. Thus, the Commission ordered Colgan Air to reinstate Mr. Khan to the next available non-flying position with retroactive seniority and benefits and an opportunity to retrain. (Final Order of the West Virginia Human Rights Commission, p. 3). In support of this conclusion, the Commission states that Colgan Air's reason for not offering Mr. Khan retraining, the fact that it was suffering financial troubles in the months immediately following September 11, 2001, is inconsistent because it

does not explain why one African-American pilot, Josk Musoke, who failed a proficiency check in December 2000, was also not offered retraining. (Final Order of West Virginia Human Rights Commission, p. 3).

Mr. Musoke's situation is not comparable because he failed his proficiency check in 2000, prior to the September 11, 2001, attacks that affected Colgan Air's financial position. Moreover, there is absolutely no information in the record regarding the circumstances surrounding Mr. Musoke's failed proficiency check and subsequent resignation. (Final Order of Judge Wilson, p. 33). Thus, the Commission's comparison of Mr. Khan and Mr. Musoke is inherently flawed. These individuals were not similarly situated, either factually or in time.

Colgan Air now appeals to this Honorable Court, and requests that it reverse the decision of the Commission. Specifically, Colgan Air contends that reversal is warranted because (1) Judge Wilson's decision was supported by substantial evidence on the whole record; (2) the Commission erred by disregarding the evidence and Judge Wilson's findings of fact and concluding that Colgan Air maintained local management at the Tri States Airport who should have reported the offensive behavior; (3) the Commission erred because the evidence of record does not support the legal conclusion that Colgan Air's decision not to retrain Mr. Khan was based on a discriminatory motive; (4) the Commission's decision is not consistent with established West Virginia precedent regarding violations of the West Virginia Human Rights Act. Moreover, the Commission's order requiring Appellant to rehire Mr. Khan and provide pilot retraining has significant aviation safety implications.

In light of these errors, and the safety issues involved, Colgan Air respectfully asks this Honorable Court to reverse the ruling of the Commission.

II.
STATEMENT OF THE RELEVANT FACTS

Colgan Air is a regional airline operating as a US Airways Express carrier. (Tr. Vol. I, p. 127). At all times relevant hereto, it has operated under Federal Aviation Regulation ("FAR") Part 121. (Final Order of Judge Wilson, p. 3; Tr. Vol. I, p. 116).

Mr. Khan submitted an application for employment as a first officer with Colgan Air on July 25, 2000. (Appellant's Public Hearing Exhibit 2). As evidenced by his application materials, prior to joining Colgan Air, Mr. Khan had held only one previous pilot position with an airline. This was a first officer position with American Eagle Airlines, an American Airlines Express carrier, from April to June, 2000. Mr. Khan was involuntarily terminated by American Eagle during training due to deficiencies in his flight skills, including among other things, difficulty with approaches and landings. (Appellant's Public Hearing Exhibits 2, 5). According to the information provided by American Eagle on August 18, 2000, during the previous five years, Mr. Khan had failed to complete an initial upgrade or transition-training course under FAR Part 121 or 135. Additionally, he had failed an initial upgrade, transition or recurrent required line or proficiency check under FAR Part 121 or 135. (Final Order of Judge Wilson, p. 11; Appellant's Public Hearing Exhibit 5).

Notwithstanding this history, Colgan Air decided to give Mr. Khan a chance to succeed and hired him as a first officer. Mr. Khan's first official day of employment with Colgan Air was September 21, 2000. (Appellant's Public Hearing Exhibit 13).

Colgan Air maintains detailed policies to ensure compliance with federal, state, and local anti-discrimination laws. The Colgan Air anti-discrimination and anti-harassment policy is set forth in the Colgan Air Employee Handbook. (Appellant's Public Hearing Exhibits 1, 3; Appellee's Public Hearing Exhibit 4). Moreover, Colgan Air employees are required to undergo Discrimination and Harassment Training. This training addresses hostile work environment situations, and the reasons why employees may be reluctant to report harassment. The training specifically states that every employee has a responsibility to prevent and report harassment, and advises that any incidents of discriminatory behavior should be reported to Mary Finnigan, Vice President, Colgan Air. (Appellant's Public Hearing Exhibit 1).

On August 7, 2000, during his employee orientation, Mr. Khan signed the Colgan Air Employee Harassment Policy & Training Acknowledgment certifying that he had reviewed and

understood the company's anti-harassment policy, and received the Colgan Air Employee Discrimination and Harassment Training. (Appellant's Public Hearing Exhibit 3).

After joining Colgan Air, Mr. Khan was stationed at the Tri States Airport crew base in Huntington, West Virginia. Shortly thereafter, on May 3, 2001, Colgan Air Captain Jimmy Galbraith submitted an Irregularity Event Report Form stating that he had been forced to take control of an aircraft on a passenger flight after Mr. Khan twice failed to properly execute a landing approach. (Final Order of Judge Wilson, pp. 10-11; Appellant's Public Hearing Exhibit 6).

One month later, in June 2001, Mr. Khan met with Colgan Air Vice President of Administration Mary Finnigan and told her that Terry Riley, a Colgan Air employee, had made inappropriate comments of a discriminatory nature to him. He also told Mrs. Finnigan that there were no witnesses to this behavior. During this meeting, he never indicated that any other individuals had made discriminatory comments to him. (Final Order of Judge Wilson, pp. 6-7; Tr. Vol. I, pp. 86, 146-47; Appellee's Public Hearing Exhibit 5). This June 2001 meeting was the first time any Colgan Air management personnel learned about the discriminatory behavior directed towards Mr. Khan. (Tr. Vol. I, pp. 117-18; Tr. Vol. II, pp 203-04).[2]

In response to Mr. Khan's complaint, Colgan Air immediately initiated an investigation of Riley. On June 20, 2001, Riley was retrained with respect to the Colgan Air harassment and discrimination policy, and clearly warned that any other incidents of discriminatory behavior would result in severe disciplinary action, up to and including termination. Riley was also issued a written reprimand. (Final Order of Judge Wilson, pp. 7-8; Tr. Vol. I, pp 86-87; Appellant's Public Hearing Exhibit 5; Appellant's Public Hearing Exhibit 10).

From June 20, 2001 to July 9, 2001, Mr. Khan did not contact Mrs. Finnigan,

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[2] As noted above, similar to other airlines, Colgan Air does not maintain management personnel at its crew bases. Rather, pilots are supervised by the Chief Pilot located at company headquarters in Manassas, Virginia. "Lead Pilot" is not a supervisory or managerial position; an individual holding this position has no management authority or responsibilities. (Final Decision of Judge Wilson, pp. 5).

or any other Colgan Air management personnel, to report further offensive, retaliatory, or other harassing conduct. (Tr. Vol. I, pp. 118-19). However, on July 9, 2001, Colgan Air management learned that another employee, Ryan Hueston, had drawn an offensive and discriminatory cartoon and posted the same on a bulletin board at Colgan Air's Huntington facility. Colgan Air immediately removed the cartoon from the bulletin board, and called Hueston for a disciplinary meeting. Hueston however, submitted his resignation and did not appear for the meeting. (Final Order of Judge Wilson, pp. 8-9; Tr. Vol. I, pp. 98, 107; Appellee's Public Hearing Exhibit 9). Additionally, on July 9, 2001, Colgan Air management, for the first time, learned that Riley's inappropriate behavior toward Mr. Khan had not stopped. Riley was immediately called for a disciplinary meeting where he was told that his behavior would not be tolerated, and was forced to resign or be terminated. (Final Order of Judge Wilson, p. 9; Tr. Vol. I, pp. 107, 110; Appellant's Public Hearing Exhibit 10).

After Riley and Hueston left Colgan Air, Mr. Khan was not subjected to any further offensive, retaliatory, or other harassing conduct. Colgan Air had effectively handled the situation in accordance with its established policies and procedures. (Final Order of Judge Wilson, pp. 24-26; Tr. Vol. I, pp. 286-87; Tr. Vol. II, pp. 70-74). Significantly, from July 9, 2001 to April 8, 2002, the date that Mr. Khan filed his complaint with the Commission, he never indicated any dissatisfaction with the results of Colgan Air's investigation and/or response to his discrimination complaints, nor did he allege any further offensive, retaliatory, or other harassing conduct. (Tr. Vol. I, pp. 140, 145-46).

In the aftermath of September 11, 2001, Colgan Air, like virtually all air carriers, suffered severe financial difficulties due to the significant decrease in air traffic. As a result, it was forced to furlough many qualified pilots and other personnel, and consult a bankruptcy attorney. Colgan Air also returned three leased aircraft to the leasors due to its economic condition at the time. (Tr. Vol. I, p. 141; Appellant's Public Hearing Exhibit 8). Due to this financial situation, in the months immediately following the terrorist attacks, Colgan Air could not afford to retrain any

pilots who did not pass FAA-mandated proficiency checks.[3] (Final Order of Judge Wilson, p. 17; Tr. Vol. I, pp 140-43; Tr. Vol. II, p. 140; Appellant's Public Hearing Exhibit 9).

On October 30, 2001, Mr. Khan underwent an FAA-mandated, previously scheduled, proficiency check pursuant to FAR 121.441. (Final Order of Judge Wilson, p. 11; Appellant's Public Hearing Exhibits 11, 12). Colgan Air Captain and Director of Flight Standards Jeb Barrett acted as the check airman for the proficiency check and Captain Tom Brink acted as the non-flying pilot.

During the proficiency check, Captain Barrett directed Mr. Khan to perform a takeoff stall, which was an FAA required maneuver. Mr. Khan failed to complete this task in a satisfactory manner because he lost an unacceptable amount of altitude during the maneuver, said amount being defined by FAA regulations. (Tr. Vol. II, pp. 119-21). Captain Barrett verbally informed Mr. Khan that the takeoff stall maneuver was unsatisfactory. As he was authorized to do, Captain Barrett suspended the testing portion of the flight, provided retraining to Mr. Khan, and then allowed Mr. Khan to attempt the maneuver again. After the retraining, Mr. Khan performed the maneuver in a satisfactory manner. (Final Order of Judge Wilson, p. 12; Tr. Vol. II, pp. 121-22; Appellant's Public Hearing Exhibit 12).

Captain Barrett then directed Mr. Khan to perform an ILS approach, another FAA required maneuver, during the proficiency check. This maneuver required Mr. Khan to turn the aircraft onto the localizer, an electronic beam that positions the aircraft relative to the extended center line of the runway. However, Mr. Khan flew through the localizer and then, in an attempt to turn the aircraft and rejoin the localizer, operated the electric trim system of the aircraft. Use of the electric trim automatically disengaged the autopilot.[4] This resulted in Mr.

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[3] Pursuant to the Federal Aviation Regulations ("FARs"), Colgan Air first officers are required to pass proficiency checks every 12 months in order to engage in revenue flying. 14 C.F.R. § 121.441(2007).

[4] Complainant alleged that Captain Brink purposefully disengaged the autopilot function. This is a false assertion. The autopilot automatically disengaged because Mr. Khan manually operated the electric trim system. (Tr. Vol. II, pp. 125, 181-83). Notably, at the time, Mr. Khan never indicated to Captain

Khan deviating from the center lines of the localizer and glide slope and exceeding permitted descent speed, which resulted in an unstabilized approach. (Final Order of Judge Wilson, pp. 12-13; Tr. Vol. II, pp. 123-26).

Captain Barrett informed Mr. Khan that the ILS approach was unsatisfactory. Captain Barrett again provided retraining and allowed Mr. Khan to repeat this maneuver. After the retraining, Mr. Khan performed the ILS approach in a satisfactory manner. (Final Order of Judge Wilson, pp. 12-13; Tr. Vol. II, pp. 127-28; Appellant's Public Hearing Exhibit 12).

After the ILS approach, Captain Barrett directed Mr. Khan to complete a VOR approach, another FAA required maneuver, during the proficiency check. While attempting this approach, Mr. Khan was late configuring the aircraft in terms of landing gear and reduction of power. Mr. Khan also placed the aircraft in a dangerous dive and caused the Ground Proximity Warning System to activate. At this point, Captain Brink was forced to take control of the aircraft away from Mr. Khan in order to prevent a catastrophic accident. (Final Order of Judge Wilson, p. 13; Tr. Vol. II, pp. 131-37, 184-87; Appellant's Public Hearing Exhibit 12).

Captain Barrett informed Mr. Khan that the VOR approach was unsatisfactory, and since he had already trained him to proficiency on two failed maneuvers, the maximum allowed by the FAA regulations, the proficiency check was required by the FAA to be deemed unsatisfactory due to his failure of a third required maneuver. Mr. Khan verbally acknowledged his poor performance. (Final Order of Judge Wilson, p. 13; Tr. Vol. I, pp. 138-39; Appellant's Public Hearing Exhibits 9, 11, 12).

In administering Mr. Khan's proficiency check, Captain Barrett treated him the same way he has treated every other pilot to whom he has administered a proficiency check. (Tr. Vol. II, p. 105). Mr. Khan never indicated to Captain Barrett, or any Colgan Air management personnel,

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Barrett or anyone else that he thought Captain Brink had disengaged the autopilot during his initial attempt to perform an ILS approach. (Tr. Vol. II, pp. 128, 141-42).

that he felt he was treated unfairly or sabotaged during the October 30, 2001 proficiency check. (Tr. Vol. II, pp. 141-42; Appellant's Public Hearing Exhibit 9).

After the proficiency check, Captain Barrett debriefed Mr. Khan on the takeoff stall maneuver, the ILS approach, and the VOR approach. (Tr. Vol. I, p. 139; Appellant's Public Hearing Exhibit 12). Mr. Khan was then informed that, due to economic constraints, Colgan Air could not afford to retrain him to meet the minimum requirements of the proficiency exam. Thus, Mr. Khan was given the option of resigning or being terminated. (Final Order of Judge Wilson, p. 14; Appellant's Public Hearing Exhibit 9). Mr. Khan chose to resign from Colgan Air. In his resignation letter, he noted that it was a "pleasure working with Colgan's." (Appellant's Public Hearing Exhibit 7).

III.
ASSIGNMENTS OF ERROR

A. The Commission erred in determining that Appellant is liable in damages to Mr. Khan for harassment.

1. The Commission erred because it determined that Appellant retained "local management" at its Tri States Airport facility who "failed to address" the harassment, a premise that directly conflicts with Judge Wilson's findings of fact and the evidence of record.

2. The Commission erred in determining that Appellant is liable in damages to Mr. Khan for harassment as a matter of law.

B. The Commission erred in determining that Appellant discriminated against Mr. Khan when it did not offer him retraining after his failed proficiency check.

1. The Commission erred because its determination is not supported by substantial evidence on the whole record.

IV.
POINTS AND AUTHORITIES

The West Virginia Human Rights Act ("WVHRA") prohibits discrimination in public and private employment on the basis of race, religion, color, national origin, ancestry, sex, age, blindness, or handicap. W. Va. Code § 5-11-9 (2007); Vest v. Board of Educ., 455 S.E.2d 781 (W. Va. 1995).

A. Standard of Review

When considering a notice of appeal, the West Virginia Human Rights Commission shall limit its review to whether the ALJ's decision is: (a) In conformity with the Constitution and laws of the state and the United States; (b) Within the Commission's statutory jurisdiction or authority; (c) Made in accordance with procedures required by law or established by appropriate rules or regulations of the Commission; (d) Supported by substantial evidence on the whole record; or (e) Not arbitrary, capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion. W. Va. C.S.R. § 77-2-10 (2007).

"Substantial evidence" is such relevant evidence, on the whole record, as a reasonable mind might accept as adequate to support a finding. This is something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence. A reviewing court is not entitled to reverse the finding of the trier of fact simply because the reviewing court is convinced that it would have weighed the evidence differently if it had been the trier of fact. Fairmont Specialty Services v. West Virginia Human Rights Comm'n, 522 S.E.2d 180, 184 (W. Va. 1999).

The credibility of the witnesses is for the hearing examiner to determine. The Commission must give deference to the findings of fact of the ALJ. The Commission may make additional findings that are not in conflict with those reached by the ALJ. Fairmont Specialty Services, 522 S.E.2d 180, 184 (W. Va. 1999).

With regard to this Court's review of the factual findings made by the Commission,

such findings should be sustained if they are supported by substantial evidence or are unchallenged by the parties. West Virginia Human Rights Comm'n. v. United Transp. Union, Local No. 655, 280 S.E.2d 653 (W. Va. 1981).

Although the substantial evidence rule applies to findings of fact rendered by an administrative agency such as the Commission, legal rulings made by the Commission are subject to *de novo* review. Fairmont Specialty Services, 522 S.E.2d 180, 184 (W. Va. 1999); Ruby v. Ins. Comm'n. of West Virginia, 475 S.E.2d 27, 32 (W. Va. 1996).

"Evidentiary findings made at an administrative hearing should not be reversed unless they are clearly wrong." Ruby v. Ins. Comm'n. of West Virginia, 475 S.E.2d 27, 32 (W. Va. 1996).

B. Hostile or Abusive Work Environment

In order to establish a claim of ancestral/race discrimination based upon a hostile or abusive work environment, a plaintiff-employee must prove that: (1) the subject conduct was unwelcome; (2) it was based on the ancestry of the plaintiff; (3) it was sufficiently severe or pervasive to alter the plaintiff's conditions of employment; and (4) it was imputable on some factual basis to the employer. Fairmont Specialty Services v. West Virginia Human Rights Comm'n., 522 S.E.2d 180, 189 (W. Va. 1999).

When the source of harassment is a co-worker, an employer's liability is determined by its knowledge of the offending conduct, the effectiveness of its remedial procedures, and the adequacy of its response. Fairmont Specialty Services, 522 S.E.2d at 189. A harassment plaintiff must show that the employer "knew or should have known about the harassment and failed to take prompt remedial action reasonably calculated to stop the harassment." Fairmont Specialty Services, 522 S.E.2d at 189.

Factors that are useful in evaluating the reasonableness of remedial measures include the options available to the employer, such as employee training sessions, transferring the harassers, written warnings, reprimands in personnel files, or termination, and whether or not the measures

ended the harassment. Carter v. Chrysler Corp., 173 F.3d 693 (8th Cir. 1999);[5] Fairmont Specialty Services, 522 S.E.2d at 189.

An employer that has established clear rules forbidding harassment and has provided an effective mechanism for receiving, investigating and resolving complaints may not be liable in a case of co-worker harassment where the employer had neither knowledge of the misconduct nor reason to know of it. Fairmont Specialty Services, 522 S.E.2d at 189 citing Hanlon v. Chambers, 464 S.E.2d 741 (W. Va. 1995).

A co-worker with superior rank but only minimal authority over an allegedly harassed plaintiff is not a "supervisor" for purposes of imputing liability to an employer. Mikels v. City of Durham, N.C., 183 F.3d 323, 333 (4th Cir. 1999). If such an individual has no power to take tangible employment actions against the plaintiff, and only has authority to occasionally direct operational conduct, the individual is not a supervisor. See Mikels v. City of Durham, N.C., 183 F.3d 323 (4th Cir. 1999) (holding that a corporal was not the supervisor of a private-level squad member for Title VII purposes); see also Durkin v. City of Chicago, 199 F. Supp. 2d 836 (N.D. Ill. 2002) (holding that the fact that one police officer outranks another does not establish a supervisory relationship that would support imposing vicarious liability in a Title VII hostile work environment claim).

The essence of supervisory status is the authority to affect the terms and conditions of the victim's employment. This authority primarily consists of the power to hire, fire, demote, promote, transfer, or discipline an employee. Hall v. Bodine Elec. Co., 276 F.3d 345, 355 (7th Cir. 2002); Bray v. City of Chicago, No. 01 C 7770, 2002 U.S. Dist. LEXIS 20889, at *17 (N.D. Ill. October 30, 2002). The mere fact that an employer authorizes one employee to oversee

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[5] The evidentiary standards for suits brought pursuant to the WVHRA are identical to those applicable to claims asserted under the anti-employment discrimination provisions of the Act's federal counterpart, Title VII of the Civil Rights Act of 1964. W. Va. Code Ann. § 5-11-1(2007); Heneger v. Sears, Roebuck & Co., 965 F. Supp. 833, 835-36 (N.D. W. Va. 1997); Heston v. Marion County Parks and Recreation Comm'n, 381 S.E.2d 253, 256 (W. Va. 1989).

aspects of another employee's job performance does not establish a supervisory relationship. Bray, 2002 U.S. Dist. LEXIS at *18.

Even in situations where a hostile environment is created by a supervisor, an employer is not vicariously liable to a victimized employee if it can prove that (1) it exercised reasonable care to prevent and correct the harassment, and (2) the plaintiff failed to take advantage of any preventive or corrective opportunities provided by the employer.[6] Faragher v.City of Boca Raton, 524 U.S. 775, 807 (1998).

C. Disparate Treatment and Retaliatory Discharge

In order to establish a prima facie case of employment discrimination, the plaintiff must offer proof of the following: (1) that the plaintiff is a member of a protected class; (2) that the employer made an adverse decision concerning the plaintiff; and (3) but for the plaintiff's protected status, the adverse decision would not have been made. Heston v. Marion County Parks and Recreation Comm'n, 381 S.E.2d 253, 256 (W. Va. 1989).

A complainant in a disparate treatment, discriminatory discharge case may meet the initial prima facie burden by proving, in addition to factor (1) above, that the complainant was discharged or forced to resign, and that a nonmember of the protected group was not disciplined, or was disciplined less severely, than the complainant, though both engaged in similar conduct. State of W. Va. Human Rights Comm'n v. Logan-Mingo Area Mental Health Agency, Inc., 329 S.E.2d 77, 85 (W. Va. 1985).

In an action to redress an unlawful retaliatory discharge under the WVHRA, the burden is on the complainant to prove by a preponderance of the evidence that: (1) the complainant engaged in a protected activity; (2) complainant's employer was aware of the protected activity; (3) complainant was subsequently discharged; and (absent other evidence tending to establish retaliatory motivation), (4) complainant's discharge followed his or her protected activity within

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[6] This affirmative defense is only available to employers who have not taken any tangible employment action against the complainant. A "tangible employment action" is defined as a significant change in employment status resulting from the harassment. See Faragher, 118 U.S. at 808.

such period of time that the court can infer retaliatory motivation. Hanlon v. Chambers, 464 S.E.2d 741, 753 (W. Va. 1995).

If a complainant successfully establishes a prima facie case, the burden shifts to the employer to offer some legitimate and nondiscriminatory reason for the employment action. Should the employer succeed in rebutting the presumption of discrimination, the complainant has the opportunity to prove by a preponderance of the evidence that the reasons offered by the employer were merely a pretext for the unlawful termination. State of W. Va. Human Rights Comm'n v. Logan-Mingo Area Mental Health Agency, Inc., 329 S.E.2d 77, 82 (W. Va. 1985).

V.
DISCUSSION OF LAW

A. The Commission erred in determining that Appellant is liable in damages to Mr. Khan for harassment.

The Commission erred in determining that Colgan Air is liable in damages to Mr. Khan for harassment because there is an insufficient factual basis for imputing the hostile and abusive work environment to Colgan Air.

1. The Commission erred because it determined that Appellant retained "local management" at its Tri State Airport facility who "failed to address" the harassment, a premise that conflicts with Judge Wilson's findings of fact and the evidence of record.

In its Final Decision, in justification of its determination that Appellant is liable in damages to Mr. Khan, the Commission stated that:

> The Appellee's management officials at the Tri-State Airport failed to address this harassment at the Tri-State Airport until compelled to do so by the Appellee's corporate management located at Manassas, Virginia. Indeed, the Appellee's local management failed even to notify the corporate management in Manassas, Virginia, at all, about the harassment that was going on at the Tri-State Airport. The Complainant, himself, was required to travel to Manassas to report the harassment. To the Appellee's credit, once the report of harassment was made to the Appellee's management officials in Manassas, the Appellee did act to stop the harassment.

(Final Decision of the Commission, p. 2). Thus, the Commission ordered Colgan Air to pay Mr. Khan $5,000.00 for the harassment suffered, in addition to expenses he incurred in traveling to Manassas, Virginia to report the harassment, something the Commission believes "should have been the responsibility of the Petitioner's local management officials at the Tri-State Airport." (Final Decision of the Commission, p. 2).

It is unclear who the Commission is referring to when it discusses "local management." There is no concept of local management in the Colgan Air business structure. Similar to most airlines, management officials are based at company headquarters, not at the various crew bases around the country. (Tr. Vol. I, p. 54).

Assuming that the Commission's reference to "local management" is a reference to the lead pilot at the Huntington facility, David Mayers, this determination directly conflicts with Judge Wilson's findings of fact. Based on the substantial testimony and documentary evidence introduced at the public hearing, Judge Wilson found that:

> When flight crews are out on a trip, the First Officer would address any complaints or concerns to the Captain. Should the concern be with the Captain, then the complaint or concern is to be addressed to the Chief Pilot. **The Lead Pilot is not a supervisory position.**

(Final Order of Judge Wilson, p. 17). This factual finding is supported by extensive testimony from Colgan Air Director of Flight Standards Jeb Barrett. Moreover, this fact is clearly set forth in the Colgan Air Flight Operations Policies and Procedures Manual, which is issued to every pilot that joins the company, and approved and mandated by the FAA. Notably, the flight operations chain of command does not even list the "lead pilot" position. (Tr. Vol. II, pp. 101-103). Lead Pilot David Mayers had no management responsibilities at the Huntington crew base. (Final Order of Judge Wilson, p. 17).

This Court has held that a reviewing court is not entitled to reverse the finding of the trier of fact simply because the reviewing court is convinced that it would have weighed the evidence differently if it had been the trier of fact. Fairmont Specialty Services v. West Virginia Human

Rights Comm'n, 522 S.E.2d 180, 184 (W. Va. 1999). Moreover, the credibility of the witnesses is for the hearing examiner to determine. The Commission must give deference to the findings of fact of the ALJ. The Commission may make additional findings that are not in conflict with those reached by the ALJ. Id.

The Commission erred in determining that Colgan Air maintained "local management" who should have reported the offensive behavior because it disregarded Judge Wilson's findings of fact and the substantial evidence supporting the fact that there was no local management in Huntington. The Commission is not entitled to reverse the ALJ's factual findings simply because it may have weighed the evidence differently if it was the finder of fact.

Moreover, the fact that there is no "local management" concept in the Colgan Air business model is reinforced in Colgan Air's Employee Discrimination and Harassment Training, which identifies the individuals to whom discriminatory conduct should be reported. This training identifies the various forms of harassment and discrimination and clearly states that:

> If an employee believes he/she is being subjected to any of these forms of harassment, or believes is being discriminated against because other employees are receiving favored treatment in exchange, for example, for sexual favors, we must bring this to the attention of appropriate persons in management. The very nature of harassment makes it virtually impossible to detect unless the person being harassed registers his or her discontent with Colgan Air management. Consequently, in order for Colgan Air to deal with the problem, employees must report such offensive conduct or situations to their immediate supervisor, or to the Vice President, Marketing and Personnel: Mary Finnigan at 703-331-3102.

(Appellant's Public Hearing Exhibit 1). On August 7, 2000, Mr. Khan signed an acknowledgment indicating that he had received Colgan Air's Discrimination and Harassment Training, and understood Colgan Air's policy in this regard. (Appellant's Public Hearing Exhibit 3). As a first officer, Mr. Khan's immediate supervisor was the Chief Pilot, who was located in Manassas, Virginia. (Final Decision of Judge Wilson, p. 5).

The Commission's determination that Colgan Air is liable in damages to Mr. Khan for harassment should be reversed because the fact upon which the Commission relies to arrive at

this conclusion, that "local management" failed to take action, directly conflicts with the ALJ's findings of fact and the evidence of record in this matter. Mr. Khan could have reported the discrimination at any time simply by calling Mrs. Finnigan. Even the Commission noted that once management officials in Manassas were notified of the conduct, Colgan Air "did act to stop the harassment." (Final Decision of the West Virginia Human Rights Commission, p. 2).

For these reasons, this Court should reverse the Commission's determination that Colgan Air is liable in damages to Mr. Khan for harassment.

2. The Commission erred in determining that Appellant is liable in damages to Mr. Khan for harassment as a matter of law.

This Court has held that an employer that has established clear rules forbidding harassment and has provided an effective mechanism for receiving, investigating and resolving complaints may not be liable in a case of co-worker harassment where the employer had neither knowledge of the misconduct nor reason to know of it. Fairmont Specialty Services, 522 S.E.2d at 189 citing Hanlon v. Chambers, 464 S.E.2d 741 (W. Va. 1995). When the source of harassment is a person's co-workers, an employer's liability is determined by its knowledge of the offending conduct, the effectiveness of its remedial procedures, and the adequacy of its response. Fairmont Specialty Services, 522 S.E.2d at 189. Factors that are useful in evaluating the reasonableness of remedial measures include the options available to the employer, such as employee training sessions, transferring the harassers, written warnings, reprimands in personnel files, or termination, and whether or not the measures ended the harassment. Carter v. Chrysler Corp., 173 F.3d 693 (8th Cir. 1999); Fairmont Specialty Services, 522 S.E.2d at 189.

In Fairmont Specialty Services v. West Virginia Human Rights Comm'n., 522 S.E.2d 180 (W. Va. 1999), this Court addressed a claim of ancestral discrimination in violation of the WVHRA. In Fairmont Specialty Services, this Court affirmed a decision of the Commission awarding the Complainant damages for harassment because it determined that the employer did not take prompt remedial action reasonably calculated to end the behavior. The Complainant in

Fairmont Specialty Services was subjected to repeated, derogatory remarks from a co-employee for a period of almost two years. These incidents took place at the plant where the Complainant, the offending employee, and management officials were all present. The ALJ determined that the Complainant initially complained to management about the abusive behavior in March 1995, when the conduct first started. Fairmont Specialty Services, 522 S.E.2d at 185. Subsequently, the Commission found that Complainant had made over twenty-five complaints to her immediate supervisor in 1995 and 1996. Id. She also complained to other managers at various times. However, despite these numerous complaints to various management personnel, the situation was not properly addressed until Complainant retained an attorney and filed an action with the Commission, almost two years after the behavior started. Even at this point, the employer simply warned the perpetrator, and as before, this action did not stop the offensive behavior. The employer did not impose any real sanction on the offensive employee until it discharged him in October 1996. Id. at 191.

The present scenario is significantly distinguishable from the Fairmont Specialty Services case. Unlike the employer in Fairmont Specialty Services, Colgan Air management took immediate action against Riley as soon as it became aware of the situation in June 2001, when Mr. Khan complained to Mary Finnigan. Riley was called to attend a disciplinary meeting, retrained with respect to the company harassment and discrimination policy, and issued a written reprimand, which was placed in his personnel file. (Final Order of Judge Wilson, pp. 7-8; Tr. Vol. I, pp 86-87; Appellee's Public Hearing Exhibit 5; Appellant's Public Hearing Exhibit 10). Shortly thereafter, when management learned that the behavior had not stopped, Riley and another harasser, Ryan Hueston, were forced to resign. (Final Order of Judge Wilson, pp. 8-9; Tr. Vol. I, pp. 98, 107, 110; Appellee's Public Hearing Exhibits 9, 10).

After these individuals left Colgan Air, Mr. Khan himself admits that the harassment stopped. (Final Order of Judge Wilson, pp. 24-26; Tr. Vol. I, pp. 286-87; Tr. Vol. II, pp. 70-74). Notably, Mr. Khan continued to work at Colgan Air for many months after Riley and Hueston

were forced to resign. He did not leave the company and file this discrimination action until after he failed an FAA-mandated flight proficiency check.

Conversely, in Fairmont Specialty Services, the Complainant reported discriminatory incidents on numerous occasions, to various individuals in management, for a period of almost two years. Ultimately, Complainant had to file a legal action in order to get any relief from the harassment. Moreover, the harassment occurred in a small plant, where management personnel were physically present and potentially able to observe the behavior. Fairmont Specialty Services, 522 S.E.2d at 191. In the present case, Mr. Khan indicated that their were no witnesses to the harassment. Moreover, since Colgan Air had no management personnel located at the Huntington crew base; thus, management did not learn of the conduct until Mr. Khan followed company procedures and reported the behavior. (Final Decision of Judge Wilson, pp. 5; Tr. Vol. I, p. 86).

The perpetrators of the discriminatory conduct in the present case were not supervisory personnel.[7] However, notably, the United States Supreme Court has held in similar Title VII actions that even in situations where a hostile environment is created by a supervisor, an employer is not vicariously liable to a victimized employee if it can prove that (1) it exercised reasonable care to prevent and correct the harassment, and (2) the plaintiff failed to take advantage of any preventive or corrective opportunities provided by the employer.[8] Faragher v.

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[7] Riley and Hueston were not supervisors. If an individual has no power to take tangible employment actions against the plaintiff, and only has authority to occasionally direct operational conduct, the individual is not a supervisor. See Mikels v. City of Durham, N.C., 183 F.3d 323 (4th Cir. 1999) (holding that a corporal was not the supervisor of a private-level squad member for Title VII purposes); see also Durkin v. City of Chicago, 199 F. Supp. 2d 836 (N.D. Ill. 2002) (holding that the fact that one police officer outranks another does not establish a supervisory relationship that would support imposing vicarious liability in a Title VII hostile work environment claim). Riley and Hueston did not have any authority to hire, fire, demote, promote, or take any other tangible employment actions against Mr. Khan. (Tr. Vol. I, p. 76).

[8] This affirmative defense is only available to employers who have not taken any tangible employment action against the complainant. A "tangible employment action" is defined as a significant change in employment status resulting from the harassment. See Faragher, 118 U.S. at 808.

City of Boca Raton, 524 U.S. 775, 807 (1998). As previously stated, Colgan Air maintains extensive policies to ensure compliance with federal, state, and local anti-discrimination laws. The Colgan Air anti-discrimination policy is set forth in the Colgan Air Employee Handbook. (Appellant's Public Hearing Exhibits 1, 3; Appellee's Public Hearing Exhibit 4). Colgan Air employees are also required to undergo Discrimination and Harassment Training. This training clearly sets forth the proper method for reporting any discriminatory incidents. (Appellant's Public Hearing Exhibit 1). As is evidenced by Mr. Khan's signed acknowledgment, he received a copy of the company's anti-harassment policy and the associated anti-discrimination training. (Appellant's Public Hearing Exhibit 3). Clearly, Mr. Khan was aware of company procedures for reporting harassment. Significantly, as soon as he decided to follow these procedures, and report the conduct, the situation was rectified.

Colgan Air promptly and effectively addressed Mr. Khan's discrimination complaint. Thus, the discriminatory behavior of Riley and Hueston cannot be factually imputed to Colgan Air as a matter of law. For these reasons, this Court should reverse the Commission's determination that Colgan Air is liable in damages to Mr. Khan for harassment.

B. The Commission erred in determining that Appellant discriminated against Mr. Khan when it did not offer him retraining after his failed proficiency check.

In order to establish a prima facie case of employment discrimination, the plaintiff must offer proof of the following: (1) that the plaintiff is a member of a protected class; (2) that the employer made an adverse decision concerning the plaintiff; and (3) but for the plaintiff's protected status, the adverse decision would not have been made. Heston v. Marion County Parks and Recreation Comm'n, 381 S.E.2d 253, 256 (W. Va. 1989). If a complainant successfully establishes a prima facie case, the burden shifts to the employer to offer some legitimate and nondiscriminatory reason for the employment action. Should the employer succeed in rebutting the presumption of discrimination, the complainant has the opportunity to prove by a preponderance of the evidence that the reasons offered by the employer were merely a

pretext for the unlawful termination. State of W. Va. Human Rights Comm'n v. Logan-Mingo Area Mental Health Agency, Inc., 329 S.E.2d 77, 82 (W. Va. 1985).

1. The Commission erred because its determination is not supported by substantial evidence on the whole record.

In its Final Order, the Commission modified Judge Wilson's decision, and determined that Mr. Khan was discriminated against because he was not offered retraining after he failed the FAA-mandated proficiency check. Thus, the Commission ordered Colgan Air to reinstate Mr. Khan to the next available non-flying position with retroactive seniority and benefits and an opportunity to retrain. (Final Order of the Commission, p. 3). The Commission's determination is not supported by substantial evidence on the whole record.

As previously stated, in the aftermath of September 11, 2001, Colgan Air suffered severe financial difficulties due to the significant decrease in air traffic. As a result, it was forced to furlough many qualified pilots and other personnel, consult a bankruptcy attorney, and return three leased aircraft. (Tr. Vol. I, p. 141; Appellant's Public Hearing Exhibit 8). Due to this financial situation, in the months immediately following the terrorist attacks, Colgan Air could not afford to retrain any pilots who did not pass FAA-mandated proficiency exams.[9] (Final Order of Judge Wilson, p. 17; Tr. Vol. I, pp 140-43; Tr. Vol. II, p. 140; Appellant's Public Hearing Exhibit 9).

Mr. Khan underwent a previously-scheduled, FAA-mandated proficiency check on October 30, 2001 pursuant to FAR 121.441. During this proficiency check, he failed two required maneuvers and was provided retraining and retesting on those items, as permitted by FAA regulations. He then failed a third required maneuver, and placed the aircraft in a dangerous dive. As a result, he was informed that the proficiency check was unsatisfactory.[10]

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[9] Pursuant to the FARs, Colgan Air first officers are required to pass proficiency checks every 12 months in order to engage in revenue flying. 14 C.F.R. § 121.441(2007).

[10] In administering Mr. Khan's proficiency check, Captain Barrett treated him the same way he has treated every other pilot to whom he has administered a proficiency check. (Tr. Vol. II, p. 105). Moreover, Mr. Khan never indicated to Captain Barrett, or any Colgan Air management personnel, that

Notably, the flight deficiencies displayed in the proficiency check relating to approaches and landings were consistently present throughout Mr. Khan's short flying career. For example, Mr. Khan exhibited similar deficiencies while he was employed at American Eagle Airlines, and thus, was involuntarily terminated from that employment. (Final Order of Judge Wilson, p. 11; Appellant's Public Hearing Exhibits 2, 5).

After the proficiency check, Mr. Khan was told that Colgan Air could not afford to retrain him to meet the minimum requirements of the proficiency exam due to economic constraints. Thus, he was given the option of resigning or being terminated. (Final Order of Judge Wilson, p. 14; Appellant's Public Hearing Exhibit 9). Mr. Khan chose to resign from Colgan Air. In his resignation letter, he noted that "it's pleasure working with Colgan's." (Appellant's Public Hearing Exhibit 7).

In support of its determination that Mr. Khan was discriminated against because he was not offered retraining, the Commission states that Colgan Air "only awarded white males the opportunity to retrain on the simulator after a failed flight proficiency test in 2000 and 2001." The Commission further stated that Colgan Air's financial troubles do not explain why one African-American pilot, Josk Musoke, who failed a proficiency check in 2000, was not offered retraining. (Final Order of the Commission, p. 3).

The Commission's logic is flawed. Initially, it should be noted that none of the white pilots who were offered opportunities to retrain after failing proficiency checks in 2000 and 2001, or Mr. Musoke, failed proficiency checks in the months immediately following September 11, 2001, when flying activities in this country were severely curtailed. Thus, their circumstances cannot be compared to that of Mr. Khan, who failed his proficiency check in October 2001, during the immediate aftermath, financial and otherwise, of the events of September 11th. (Appellee's Public Hearing Exhibit 2). Moreover, there is absolutely no

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he felt he was treated unfairly or sabotaged during the October 30, 2001 proficiency check. (Tr. Vol. II, pp. 141-42; Appellant's Public Hearing Exhibit 9).

information in the record regarding the circumstances surrounding Josk Musoke's failed proficiency check and subsequent resignation. (Final Order of Judge Wilson, p. 33). The fact that Mr. Musoke failed and was not provided retraining alone cannot support the Commission's determination that Colgan Air discriminated against Mr. Khan.

Additionally, it should be noted that the evidence established that Michael Duncan, an African American male who failed his proficiency check in late November 2001, was offered an opportunity to retrain and recheck because the company's financial position had begun to improve at this point. Although Mr. Duncan felt that certain aspects of his proficiency check were unprofessional, and thus decided to tender his resignation rather than retake the proficiency check, in his deposition he stated:

> Q. Do you feel that Captain Brink or Captain Garihan, or anybody else at Colgan Air who you made contact with in connection with what you testified to today, treated you that way, whether you want to call it unfairly or unprofessionally or however you want to characterize it, **because you're African-American?**
>
> A. **I would have to say no.**

(Transcript of Deposition of Michael Duncan, p. 108:1-8).

Colgan Air did not provide Mr. Khan with retraining because he exhibited extremely poor flight skills and failed an FAA-mandated proficiency check during a time when the company was suffering economically. If a white pilot had similarly failed a proficiency check between September 11, 2001 and mid-November 2001, that pilot would also not have been offered retraining. Colgan Air's employment decision was based on legitimate, non-discriminatory reasons, and Mr. Khan has not provided any evidence to support the conclusion that the action was a pretext for unlawful discrimination.

Moreover, this Court should note that, based on Mr. Khan's poor flight record, the Commission's order to reinstate him and provide pilot retraining has significant aviation safety implications. Colgan Air pilots are responsible for the safety of every passenger aboard their

aircraft. Only qualified individuals should be placed in such positions, where the lives of many are at stake if an error is made.

For these reasons, this Court should reverse the Commission's determination that Colgan Air discriminated against Mr. Khan when it did not offer him an opportunity to retrain.

VI.
RELIEF PRAYED FOR

Based on all of the foregoing reasons, the Appellant Colgan Air, Inc. respectfully requests that this Court reverse the determination of the Commission, find in the Appellant's favor, and dismiss this matter with prejudice.

VII.
REQUEST FOR ORAL ARGUMENT

Colgan Air respectfully requests permission to orally present its grounds for appeal and supporting arguments to the Court.

Respectfully submitted,

COLGAN AIR, INC.

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

COLGAN AIR, INC.,

Petitioner,

v.

WEST VIRGINIA HUMAN RIGHTS, COMMISSION; RAO ZAHID KHAN,

APPEAL NO.: 070285
(WEST VIRGINIA HUMAN RIGHTS COMMISSION DOCKET NO.: ERRELNOANCSREP-391-02)

Respondents.

CERTIFICATE OF SERVICE

I, BRIAN J. MOORE, counsel for Petitioner Colgan Air, Inc., certify that service of ***Colgan Air, Inc.'s Appellate Brief*** has been served on the parties, by U.S. Mail, postage prepaid, on this 7th day of May, 2007, as follows:

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